trict in which the application was made and this was held by the department to be a fatal defect which invalidated the entire proceeding and the entry was canceled. The applicant thereupon filed a new application for patent which was adversed by a rival claimant of the land and the customary suit was instituted in a court of competent jurisdiction to try the right of possession. The case reached the Supreme Court of the United States which held that the land department's cancelation was based upon a mistake of law and was, therefore, subject to judicial review and did not operate to deprive the original applicant of its property in the mines and the irregularity in the proof of posting was not jurisdictional and could be corrected. The court said in the course of its opinion that the policy of the United States in disposing of its public lands is not that of the ordinary proprietor of real estate, who seeks to sell at the highest possible price, but the land is offered on liberal terms to encourage the citizen and to develop the country. "The Government does not deal at arms length with the settler or locator and whenever it appears that there has been a compliance with the substantial requirements of the law, irregularities are waived or permission is given, even on appeal, to cure them by supplemental proofs."[5]

W. E. C.

PUBLIC SERVICE COMPANY: INSURANCE COMPANY.—It is impossible to frame a permanent, inelastic list of the occupations that fall within the category of public service callings. For, while the basic principles of the law of public service have remained fairly stable, changes in economic conditions have rendered no longer necessary the inclusion of certain occupations within the class subject to this extraordinary regulation, while at the same time other callings by changing circumstances have risen from private to be of public concern, and have become subject in consequence to governmental regulation. For example, in the fifteenth century the surgeon[1] and the blacksmith[2] were regarded as engaged in public callings. We have long since ceased to find it necessary to include these occupations in the list of public callings,[3] and in their stead are found such utilities as light[4] and water companies.[5] The most recent enlargement of the field has been accomplished by the decision of the United States Supreme

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[5] Ibid., p. 258.

[1] Anon. (1441), Year Book, 19 Hen. vi. 49, pl. 5.

[2] Anon. (1450), Keilway, 50, pl. 4; Year Book, 46 Ed. iii, 19, pl. 19.

[3] Hurley v. Eddingfield (1901), 156 Ind. 416, 59 N. E. 1058, 53 L. R. A. 135, 83 Am. St. Rep. 198; Bessette v. People (1905), 193 Ill. 334, 62 N. E. 215, 56 L. R. A. 558; Wyman, Public Service Corp. §§ 6, 8.

[4] Gibbs v. Consd. Gas Co. (1888), 130 U. S. 396, 32 L. Ed. 979, 9 Sup. Ct. Rep. 553.

[5] Spring Valley Water Wks. v. Schottler (1884), 110 U. S. 347, 28 L. Ed. 173, 4 Sup. Ct. Rep. 48.

Court in the case of *German Alliance Insurance Company v. Lewis*,[6] upholding a statute of Kansas[7] which prescribed the rates to be charged by fire insurance companies.

Ever since the day of Lord Hale, the fundamental principle has been recognized that when private property is "affected with a public interest, it ceases to be *juris privati* only",[8] and must submit to regulation for the protection of the public and the promotion of the general welfare. But there has been much confusion in the cases in applying secondary tests to determine just when this public interest attaches. We find that at times the courts have used as a criterion the fact that the enterprise under consideration has been granted special privileges by the governmental authority, such as a franchise to use the streets or the right to exercise the power of eminent domain.[9] It is submitted that to apply such a test is to mistake effect for cause.[10] While special privilege often accompanies public employment, the calling is not made public by the grant of the privilege, but rather the privilege is granted because the calling is public. The criterion apparently employed by the United States Supreme Court as the determinative element is the tendency toward monopoly.[11] This test, however, cannot be relied upon in all cases as is shown by the decision in Brass v. North Dakota.[12] In this case legislative regulation was upheld because the enterprise was of a public character under the conditions which usually attended its operations, although in the case before the court the monopolistic feature was apparently wanting.[13]

Professor Wyman has explained the essential justification for public control over rates when he states that it was made necessary in view of the "public helplessness" in the face of the uncontrolled exactions of the utility.[14] Monopoly, whether legal, natural or commercial, may be only one of the causes which gives rise to this public helplessness. Thus, in the principal case, Mr. Justice McKenna points out that "the price of insurance is not fixed over the counters of the companies by what Adam Smith calls the

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[6] (Apr. 20, 1914), 233 U. S. 389, 34 Sup. Ct. Rep. 612.

[7] Kansas Session Laws, 1909, ch. 152.

[8] De Portibus Maris, 1 Harg. L. Tr. 78.

[9] Dissenting opinions of Field, J., in Munn v. Illinois (1876), 94 U. S. 113, 24 L. Ed. 77, and Peckham, J., in Budd v. N. Y. (1889), 177 N. Y. 27, 5 L. R. A. 559, 15 Am. St. Rep. 460, 22 N. E. 670.

[10] Wyman, Public Service Corps., §§ 50, 51, 56, 71.

[11] Munn v. Illinois (1876), 94 U. S. 113, 24 L. Ed. 77; Budd v. N. Y. (1891), 143 U. S. 517, 36 L. Ed. 247, 12 Sup. Ct. Rep. 468.

[12] (1894), 153 U. S. 391, 38 L. Ed. 757, 14 Sup. Ct. Rep. 857

[13] Freund, Police Power, § 376; Wyman, Public Service Corps., § 141.

[14] Wyman, Public Service Corps., §§ 120, 139; Wyman, The Law of Public Callings as a Solution of the Trust Problem, 17 Harv. Law Rev. 217, at pp. 226-231. In this article, Professor Wyman predicted that all the great industrial monopolies would eventually be treated as public service companies.

higgling of the market, but formed in the councils of the underwriters, promulgated in schedules of practically controlling constancy which the applicant for insurance is powerless to oppose, and which, therefore, has led to the assertion that the business of insurance is of monopolistic character and that, 'it is illusory to speak of a liberty of contract' ". Furthermore, the court demonstrated that, while in one sense insurance is a personal contract for indemnity against loss, yet, in a more complete sense, the relationship is interdependent in that the fundamental object is to distribute the loss suffered by one among the body of the insured. The insurance company merely affords the machinery by which this tax is collected and distributed. Viewed in its broad sense, the business of insurance is seen to be essentially different from ordinary commercial transactions, and to be affected with the greatest public concern. The decision is in accord with fundamental principle and is supported by a number of decisions from other courts.[15]

A factor making for confusion in the treatment of this topic is the failure to distinguish between the power to regulate public service companies as such and the exercise of the broader police power by virtue of which the legislature may pass laws for the protection of the health, safety, morals and the general welfare of the public, and, to this end, may regulate all corporations and all occupations, whether public or private.[16] The dissenting opinion

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[15] The following cases have sustained the constitutionality of the regulation of insurance rates by state authority:—McCarter v. Firemen's Fund Ins. Co. (1909), 74 N. J. Eq. 372, 73 Atl. 80, 414, 29 L. R. A. (N. S.) 1194, 125 Am. St. Rep. 708, 18 Ann. Cas. 1048; State v. Fraternal Knights (1904), 35 Wash. 338, 77 Pac. 500; Citizens' Ins. Co. v. Clay (1912), 197 Fed. 435. In the following cases the courts sustained statutes forbidding insurance companies to discriminate in their rates:—Carroll v. Greenwich Ins. Co. (1905), 199 U. S. 401, 50 L. Ed. 246, 26 Sup. Ct. Rep. 66; Com. v. Morningstar (1891), 144 Pa. St. 103, 22 Atl. 867; People v. Formosa (1892), 131 N. Y. 478, 30 N. E. 402, 27 Am. St. Rep. 612; Equitable Life Assur. Soc. v. Com. (1902), 113 Ky. 126, 67 S. W. 388; People v. Com. Life Ins. Co. (1910), 247 Ill. 92, 93 N. E. 90; People v. Hartford Life Ins. Co. (1911), 252 Ill. 398, 96 N. E. 1049, 37 L. R. A. (N. S.) 778. While the problem of rates was not considered in the following cases, they contain language indicating that the courts regard the business of insurance as clothed with a public interest:—Com. v. Vrooman (1894), 164 Pa. St. 306, 30 Atl. 217, 25 L. R. A. 250, 44 Am. St. Rep. 603; People v. Loew (1896), 44 N. Y. Supp. 42; John Hancock Life Ins. Co. v. Warren (1898), 59 Ohio St. 45, 51 N. E. 546; North Am. Ins. Co. v. Yates (1905), 214 Ill. 272, 73 N. E. 423; German Alliance Ins. Co. v. Hale (1911), 219 U. S. 307, 55 L. Ed. 229, 31 Sup. Ct. Rep. 246; Boston Ice Co. v. B. & M. R. R. (N. H. 1913), 86 Atl. 356. In the following cases the courts held that the insurance business was not public in its nature:—Queen Ins. Co. v. State (1893), 86 Tex. 250, 24 S. W. 397, 22 L. R. A. 483; Harris v. Com. (1912), 113 Va. 346, 73 S. E. 561; Am. Surety Co. v. Shallenberger (1910), 183 Fed. 637.

[16] Noble State Bank v. Haskell (1911), 219 U. S. 104, 55 L. Ed. 112, 31 Sup. Ct. Rep. 186, 32 L. R. A. (N. S.) 1062, Ann. Cas. 1912A, 487.

of Mr. Justice Lamar convicts the majority of having fallen into this error in the principal case, in citing as authority for the regulation under consideration various decisions sustaining statutes fixing standard forms of policies, regulating the investment of funds and the publication of accounts. Such regulations as the foregoing are traceable not to the extraordinary power to regulate public callings, but to the same general power which is exemplified in such statutes as pure food laws. While the United States Supreme Court has sustained as a valid exercise of the police power a statute fixing the weight of a loaf of bread,[17] it does not seem probable that it could be induced to give its approval to an act fixing the price of bread. Such a result would be possible only on the theory that the business of baking had become affected with a public interest.[18]

R. W. M.

WATER LAW: NATURE OF TITLE OF DISTRIBUTING COMPANY.—Does a water company by diverting water from a stream for the purpose of distribution to consumers acquire a private title to the water? Some courts have held that the title to the water-right vests in the distributing company, others have held that the distributing company is merely the agent of the consumer and that the consumer acquires the title because he actually devotes the water to a beneficial use. Upon the decision of this main question as to whether the title vests in the distributor or the consumer, many other questions such as "priorities among consumers, charges for perpetual water-rights, and valuation of the distributing system in taxation or rate cases" depend.

The question of the water title of a distributor arose in the case of *San Joaquin & Kings River Canal & Irrigation Company v. County of Stanislaus et al.* in determining the valuation of the distributing system in order to fix the rates. Judge Morrow's decision in the Circuit Court[1] that distributing companies did not hold the title to water-rights and hence could not charge rates on their valuation was recently reversed by the United States Supreme Court.[2] That court upheld the doctrine of the California courts which have recognized a distinct ownership of water-rights as being vested in distributing companies.[3]

Mr. Justice Holmes in the discussion declares that by appropriating this water for distribution and sale, the distributor does

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[17] Schmidinger v. Chicago (1913), 226 U. S. 578, 57 L. Ed. 364, 33 Sup. Ct. Rep. 182.

[18] The only case in this country that ever upheld the constitutionality of a statute fixing the price of bread was Guillotte v. New Orleans (1857), 12 La. Ann. 432.

[1] (Cir. Ct., N. D. Cal., 1911), 191 Fed. 875. See also, 1 Cal. Law Rev. 85.

[2] (April 27, 1914), 34 Sup. Ct. Rep. 652.

[3] Leavitt v. Lassen Irrig. Co. (1909), 157 Cal. 82, 106 Pac. 404, 29